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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-262

HENRY DODGE, ZOLTON FERENCY, BARBARA HALPERT and DWIGHT W. JOHNSON,

Plaintiffs-Appellants,

vs.

RICHARD H. AUSTIN, Secretary of State, State of Michigan,

Defendant-Appellee,

and

LILLIAN HATCHER, EDWIN P. HUGHES, A. ROBERT KLEINER and VIRGINIA SELIN,

Intervening Defendants-Appellees.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT COURT OF MICHIGAN, SOUTHERN DIVISION

MOTION OF INTERVENING DEFENDANTS-APPELLEES TO DISMISS OR AFFIRM

Motion to dismiss

THEODORE SACHS
Attorney for Intervening
Defendants-Appellees
1000 Farmer
Detroit, Michigan 48226
Telephone: (313) 965-3464

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MOTION TO DISMISS OR AFFIRM

Intervening defendants-appellees, Hatcher, Hughes, Kleiner and Selin, move, pursuant to Rule 16 of the Rules of the Supreme Court, that the appeal herein be dismissed, or in the alternative that the final judgment below be affirmed, for the reason that the questions on which the decision of the cause depends are so unsubstantial as not to require further argument.

COUNTER-STATEMENT OF THE CASE

On May 4, 1972, after deadlock of the Michigan Legislative Apportionment Commission, the Michigan Supreme

Court ordered the Commission to adopt a plan of legislative apportionment known as the "Hatcher-Kleiner Plan." *In Re Apportionment of State Legislature-1972,* 387 Mich 442 (1972).[1] The plan, which was implemented in subsequent elections, reflected a per cent deviation in actual versus average population of 0.0 as to both houses of the legislature.[2]

The present suit was thereafter brought to attack such plan collaterally, although plaintiffs conceded the plan's compliance with *Reynolds* v *Sims,* 377 US 533 (1964). The three-judge court unanimously denied such relief. Order Denying Pro Tanto Portion of Prayer for Injunction (April 24, 1974). Jurisdictional Statement, Appendix, 56-58.

Subsequently, the court dismissed the action, the Hon. John Feikens, U.S. District Judge, dissenting.

The present appeal ensued.

ARGUMENT

Introduction

The present appeal represents a collateral attack on the most nearly perfect, population-based legislative apportionment plan in the nation.[3]

After failing in their challenge to such plan, *In Re Apportionment of State Legislature-1972,* 387 Mich 442 (1972), and not claiming appeal thereafter to this Court, counsel for the Republican legislative apportionment commissioners in that case brought this suit, avowedly on behalf of a purported class of minor political parties and inde-

[1] Motion for relief from such judgment was subsequently denied by the Court.

[2] .0011% in the Senate, .0038% in the House. 387 Mich 442,457.

[3] *Legislative Apportionment Tables, 1972, Reapportionment in the Seventies, Council of State Governments.*

pendent voters.[4] They did so upon the uncritical but erroneous assumption[5] that a defect in the composition of the apportionment commission would necessarily taint the plan the commission had adopted.

However, plaintiffs' attack even upon the composition of the Commission itself is foreclosed by prior decisions of this and lower courts.

I.

PRIOR DECISIONS OF THIS COURT, INCLUDING *GRIVETTI* v *ILLINOIS ELECTORAL BOARD* AND *GAFFNEY* v *CUMMINGS,* PRECLUDE A CONSTITUTIONAL CHALLENGE TO THE COMPOSITION OF AN APPOINTIVE LEGISLATIVE APPORTIONMENT COMMISSION ON THE GROUND THAT IT DOES NOT HAVE THIRD PARTY OR INDEPENDENT VOTER PARTICIPATION

Appellants first challenge the composition of Michigan's Legislative Apportionment Commission because it ostensibly denies equal participation to minority parties and to independent voters in the legislative apportionment process in alleged violation of their constitutional rights. Particularly criticized is the requirement that a political party achieve 25% of the total gubernatorial vote before having

[4] Intervening-defendant Democratic commissioners moved below to dismiss, *inter alia,* because suit was "not brought by the real parties in interest and the plaintiffs do not satisfy FRCP 23(a)(4), in that the plaintiffs and their counsel will not fairly insure the adequate representation of all the purported class, in that their interests are antagonistic to the class purportedly represented." Plaintiffs' counsel subsequently acknowledged that they did and do represent the Republican Party, and that Republican members of the Michigan Senate are financing this litigation. Nevertheless, the Court below found this particular objection by intervening defendants to be without merit.

[5] Unanimously rejected below, Order Denying Pro Tanto Portion of Prayer For Injunction, Jurisdictional Statement, Appendix, 56-58.

representatives on the Apportionment Commission (not to be confused with Michigan's mere 1% requirement for political party position on the *ballot*).

These arguments are foreclosed by prior decisions of this Court which make clear that no third party or unaffiliated voter participation in the apportionment process is constitutionally required.

Thus, in *Grivetti* v *Illinois State Electorial Board,* 406 US 913 (1972), this Court summarily affirmed a three-judge decision at 335 F Supp 779 (ND Ill, 1971), which had rejected arguments virtually identical to those made here by appellants. Plaintiffs there attacked Article IV, Section 3(b) of the Illinois Constitution, which provided that in the event the Illinois legislature failed timely to apportion itself, its reapportionment would be effected by a bipartisan commission of eight members. The eight commissioners were required to be appointed, two each, by the speaker and minority leader of the house of representatives and the president and minority leader of the senate. Four of the eight commissioners were not to be legislators. The plaintiffs in *Grivetti* contended that such procedures and commission composition denied the constitutional rights of independent electors and members of minority parties who, it was claimed, were effectively excluded from the bipartisan apportionment process. Rejecting all of plaintiffs' arguments in *Grivetti,* the three-judge court asserted that:

> "Because the redistricting commission is appointive and exercises a specialized legislative function, and does that only when the legislature chooses to default, the challenges to the federal validity of the Illinois Redistricting Commission must fail.• • •
>
> "Even if it is considered that the reapportionment function is wholly legislative, the discretion of the

commission is restricted by the standards enforced by the courts since *Reynolds* v. *Sims,* as well as by the standards set by the Illinois Constitution.

"In reaching this conclusion, we are persuaded particularly by the fact that about one-third of the states have assigned legislative reapportionment outright to administrative agencies or commissions. About one-half of these states have removed the apportionment function completely from the legislature and the remaining states provide, as does Illinois, for use of the commission as a backstop in the event of legislative failure to redirect. We have discovered no successful attempt to invalidate any of these agencies, either on the basis of unconstitutional delegation of power or violation of one-man-one-vote principles."

• • •

"If every minority or other identifiable group demanded representation on the commission, it would necessarily become as large as the legislature [citations omitted] and probably would be as ineffective as the legislature has proved to be in reapportionment matters." 335 F Supp 779, 790-791.

• • •

"In the present state of federal reapportionment law, it is inconceivable that a state-sponsored plan with near-absolute equality could be considered constitutionally infirm, with the possible exception of one incorporating flagrant racial gerrymandering• • •." 335 F Supp 779, 789.

• • •

"Finding that the August 7 plan insures one-man-one-vote, as we do, we cannot see any federal abridgement of the rights of independent voters or candidates. *Williams* v *Rhodes,* 393 US 23 (1968); *Moore* v *Ogilvie,* 394 US 814 (1969)." 335 F Supp 779, 791, note 5.

As noted earlier, this Court summarily affirmed, 406 US

913 (1972), on a Jurisdictional Statement raising the same issues as urged by present appellants.

Subsequently, this Court reversed a three-judge court decision which had vacated a legislative apportionment plan adopted by a Connecticut appointment agency convened under that state's constitution, *Gaffney* v *Cummings*, 412 US 735 (1973). Under the Connecticut constitution, as described in this Court's opinion, the state legislature was given the initial opportunity timely to reapportion itself, failing which the responsibility was transferred to an eight-member bipartisan commission and thereafter, if necessary, to a three-member bipartisan board. Holding that the apportionment plan adopted by the Connecticut constitution satisfied tolerable population limits, this Court ruled that it was irrelevant that the plan was concededly partisan and designed to divide the seats in the legislature in rough proportion to the two major parties' respective political strengths. "We have repeatedly recognized that state reapportionment is the task of local legislatures *or of those organs of state government selected to perform it.*" *Id*, 412 US at 751. (Emphasis added.) Moreover, undisturbed by *Gaffney* was that part of the lower court ruling, *sub nom Cummings* v *Meskill*, 341 F Supp 139 (D. Conn, 1972), in which the three-judge panel rejected constitutional arguments as to the alleged necessary participation in the apportionment process of independent voters and members of minority parties:

> "The effort by the intervening plaintiffs to create a new constitutional requirement of inclusion of a class of registered voters unaffiliated with any party in setting up districting boards or commissions need not give us pause. There is no precedential basis for the claim. What little precedent we have found looks

> the other way. See *Socialist Workers Party* v. *Rockefeller*, 314 F. Supp 984, 997 (S.D. N.Y.) aff'd 400 U.S. 806 (1970). (Major party chairmen permitted to take part in selecting members of Boards of Elections.) The area is sufficiently confused as it is without attempting further to shackle constitutionally the legislative bodies seeking to act in the field. 341 F Supp 139, 150.

Appellants purport to distinguish *Grivetti* and *Gaffney* because allegedly in those cases, "electors had direct voting access to those who were responsible for apportionment, unlike Michigan electors." Jurisdictional Statement, 11.

That alleged distinction is not only invalid, but untrue.

In Illinois, as noted earlier, the eight-member bipartisan apportionment commission was picked two each by the Democratic and Republican leaders of the senate and house; and four members of the commission were *prohibited* from being legislators. And in Connecticut, according to *Gaffney*, all eight members of the bipartisan apportionment commission were non-legislators, picked also by the Democratic and Republican leaders of the legislature; and the back-up apportionment panel was a three-man bipartisan board, two of whose members were picked by the Republican and Democratic leadership with the third member picked by the other two, and none of three were elected legislators.

In Michigan, on the other hand, electors of unaffiliated or minority party persuasion are afforded greater opportunities for participation in the apportionment process than in either Illinois or Connecticut.

In the first place, an unaffiliated Michigan voter, without requirement of party enrollment or identification, may participate in the election of precinct delegates, MCLA 168.624,

MSA 6.1624, who in turn elect state convention delegates, MCLA 168.594, MSA 6.1594, MCLA 168.595, MSA 6.1595, who elect state central committee members, MCLA 168.597, MSA 6.1597, who select the legislative apportionment commissioners, Const 1963, art IV, §6, ¶1.

Second, all Michigan legislators (obviously, theretofore elected by electors with "direct voting access") are *ex officio* delegates to their respective parties' state conventions, where, with other delegates, they vote for the state central committee members, who pick the legislative apportionment commissioners, MCLA 168.595a, MSA 6.1595(1).

Third, "any elector," by timely application, can invoke the original jurisdiction of the Michigan Supreme Court to "direct the secretary of state or the [legislative apportionment] commission to perform their duties," to "review any final plan adopted by the commission," and to "remand such plan to the commission for further action if it fails to comply with the requirements of this constitution." Const 1963, art IV, §6,¶8.

And fourth, any political party which garners 25 percent of the preceding gubernatorial vote is on that account itself entitled to four members on the legislative apportionment commission, whose size increases to twelve. Const 1963, art IV, §6, ¶1.

Appellants' analysis not only neglects and runs counter to the directly controlling precedents cited above and the essential premise of *Gaffney* that the inherent political implications of apportionment require that the courts stay aloof from interference on *that* account, but also to the distinctions made by this Court between impairment of the voter franchise and reasonable regulation of political parties and candidates. "Of course, not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review." *Bullock* v *Carter,* 405 US 134, 143 (1972).

Thus, in *Jenness* v *Fortson,* 403 US 431 (1971), this Court rejected a challenge by third-party and independent candidates to a Georgia law which permitted the nominees of political organizations whose candidates received 20 percent or more of the vote at the most recent gubernatorial or presidential election to be nominated by primary election, while nominees of less successful political organizations were required to qualify by circulating nominating petitions with signatures equal to at least 5 percent of the electorate. Distinguishing *Williams* v *Rhodes,* 393 US 23 (1968), on which plaintiffs there, like appellants here, relied, as uniquely turning on the "entangling web of [Ohio] election laws" which as a "totality" imposed improper discrimination, the Court said that the states can validly distinguish between major and minor political parties:

> "The fact is that there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. * * * Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike, a truism well illustrated in *Williams* v *Rhodes, supra.*" 403 US 431, 441-442.

Subsequently, in *Bullock* v *Carter,* 405 US 134 (1972), the Court recognized that a state has a legitimate interest "to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting,

without the expense and burden of runoff elections. * * * Moreover, a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies." 405 US at 145.

Later, in *Storer* v *Brown,* 415 US 724 (1974), this Court recognized the legitimacy of California's "belie[f] with the founding fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government. See The Federalist, No. 10 (Madison)." 415 US at 736.

Surely, such considerations permitted Michigan in 1963 to opt for an administrative procedure for the fashioning of a plan of legislative apportionment which, although the State was free to do otherwise—as Illinois, Connecticut, and virtually every other state had done—did *not* exclude third party or independent input, but permitted such input without "clogging" the process altogether. Moreover, Michigan was entitled to take into account that unaffiliated and third party voters have not elected anyone to the legislature since 1913, and would have had less input into legislative apportionment if that function had remained in the legislature itself.[6]

[6] Indeed, in the 1974 election, with respect to which the instant suit was brought, the votes and vote percentages for governor of all third parties, including plaintiffs' (emphasized below), were only as follows:

Party	*Vote*	*Percentage*
American Independent	*20,278*	*0.8*
Socialist Labor	1,505	0.06
Social Workers	1,206	0.05
Human Rights	*28,675*	*0.9*
Conservative	4,117	0.1
Communist	1,119	0.04
U.S. Labor	898	0.03
	57,798, out of total vote of 2,657,017	= 02.17% of total

The alternative, if appellants' arguments were accepted, would be to deny to the states the remedies which political scientists have increasingly urged and which this Court sanctioned in *Gaffney* v *Cummings,* of bipartisan administrative alternatives to legislative self redistricting. For as concluded by the Court in *Grivetti,* "if every minority or other identifiable group demanded representation on the commission, it would necessarily become as large as the legislature * * * and probably would be as ineffective as the legislature has proved to be in reapportionment matters." 335 F Supp 779, 791. And, as observed by the three-judge court in *Pirincin* v *Board of Elections of Cuyahoga County,* 368 F Supp 64 (N.D., Ohio, 1973), aff'd 414 US 990 (1974), upholding an Ohio law requiring appointment of election commissioners from among nominees of the two major political parties, "The reasonableness of the method of selection of boards of elections may be tested by considering alternative methods. Were each county board enlarged to include representatives of all minority parties as well as independent voters, it is likely that the boards would be unwieldy. They would be too large to function as election machinery managers. Moreover it is apparent that one or two independent voters who might be appointed could not truly serve as adequate representatives of all independent voters. Each independent voter can really only represent himself." 368 F Supp 64, at 72.

Here, Michigan "does not place a condition on the exercise of the right to vote, nor does it quantitatively dilute votes that have been cast." *Bullock,* 405 US 134, 143. Nor does Michigan (with its one percent standard) preclude liberal access to the ballot by minority parties, although even the existence of barriers to candidate access would

"not of itself compel close scrutiny." *Bullock,* 405 US 134, 143, citing *Jenness* v *Fortson, supra.*

In short, whether the test is of a "rational" standard or of "close scrutiny," it is met. The obvious need to permit an effective and not unwieldy apportionment procedure is satisfied. The appellants are not disadvantaged in any way and they cite no alternative which is feasible.

II.
THE MICHIGAN CONSTITUTIONAL PROVISIONS DO NOT UNCONSTITUTIONALLY DELEGATE THE APPORTIONMENT POWER TO "PRIVATE GROUPS"

The second argument of appellants' Jurisdictional Statement, that the Michigan constitutional provisions involve an unlawful delegation of power to "private groups," is entirely spurious.

As answered tersely by the Court below, the commission itself is a public body which operates under the safeguards of the Constitution. And the state central committees or like organs of major political parties are not "private groups," as this Court has repeatedly emphasized in decisions recognizing their "state action" in the selection of state officials, *Bullock* v *Carter,* 405 US 134, 140; *Gray* v *Sanders,* 372 US 368 (1963); *Nixon* v *Herndon,* 273 US 536 (1927); *Smith* v *Allwright,* 321 US 649 (1944); *Terry* v *Adams,* 345 US 461 (1953); *Nixon* v *Condon,* 286 US 73 (1932).[7]

Moreover, *Grivetti, Gaffney* and *Pirincin, supra,* involve no less "delegation" than that which appellants criticize. See also *Socialist Workers Party* v *Rockefeller,* 314 F Supp

[7] We have already identified, *ante,* certain specific Michigan statutory provisions regulating the election of party delegates and state central committee members, and permitting general citizen input into such selection.

984, 997 (SD NY, 1970), aff'd 400 US 806 (1970) (major party chairmen permitted to take part in selecting members of board of elections).

Appellants would distinguish *Grivetti* because there, they say, "the power of selection of the members of the Illinois Legislative Redistricting Commission was delegated to *elected* members of the Legislature." Jurisdictional Statement, 16 (emphasis in original). But, as shown above, those delegating the apportionment function were the bi-partisan political leaders of the Illinois legislature, elected not by the voters, but by their peers, presumably in party caucus; and half of the commission to whom the function was delegated consisted of persons expressly *forbidden* to be "elected members of the Legislature."

Appellants would distinguish *Pirincin* because the members of the Ohio County Board of Elections "were appointed by the Secretary of State of Ohio, a publicly elected official." Jurisdictional Statement, 16. But that obscures the point that the very issue in *Pirincin* concerned the fact that the Secretary's appointments were generally confined to nominees of the two political parties which had garnered the highest votes in previous elections, and the appointees themselves were not elected officials.

Moreover, in *Gaffney,* as shown earlier, the "delegation" was by the bipartisan leadership of the Connecticut legislature to eight non-elected persons and, upon their failure to agree upon a plan, to a three man bipartisan board of non-elected persons.

Again, plaintiffs are urging propositions diametrically opposed to those enunciated by this Court in *Gaffney.* This Court there said that, "Politics and political considerations are inseparable from districting and apportionment • • •.

The reality is that districting inevitably has and is intended to have substantial political consequences." 412 US 735, at 753. The Court so concluded not as an excuse for a greater intrusion by the courts into the legislative apportionment process, as here urged by appellants, but the opposite—which is precisely the reason the lower court was reversed in *Gaffney* itself. If appellants' notions as to "private groups" were to obtain, realistic experimentation among the states for effective administrative remedies would be denied.[8]

III.
APPELLANTS' ARGUMENT RESPECTING GEOGRAPHIC MALAPPORTIONMENT IS INAPPLICABLE TO THIS APPOINTIVE COMMISSION

Appellants' third argument (Jurisdictional Statement, 17-20), that the apportionment commission itself is geographically malapportioned, may be simply answered: The one-man, one-vote principles of *Reynolds* v *Sims* and its progeny are simply inapplicable to appointive or non-legislative officials of any kind. "Since the choice of members of the county school board did not involve an election and since none was required for these non-legislative officers, the principle of 'one man, one vote' has no relevancy." *Sailors* v *Board of Education*, 387 US 105, 111 (1967) (appointed school board members in Michigan). See also, *Fortson* v *Morris*, 385 US 231 (1966) (Georgia governor selected by its legislature: "Not a word in the Court's opinion [in an earlier apportionment case, *Gray* v *Sanders*, 372 US 368] indicated that it was intended to compel a

[8] Appellants' reliance on *Carter* v *Carter Coal Co.*, 298 US 238 (1936), is not only otherwise inapposite, but is undermined by this Court's subsequent decision, in effect reversing *Carter*, in *Sunshine Anthracite Coal Co* v *Adkins*, 310 US 381 (1940). And see *U.S.* v *Rock Royal Cooperative Inc.*, 307 US 533 (1939).

State to elect its governors or any state officers or agents through elections of the people rather than through selections by apponitment or elections by the State assembly," 385 US 231, 233); *Hadley* v *Junior College District of Metropolitan Kansas City*, 397 US 50 (1970): "We have also held that where a State chooses to select members of an official body by appointment rather than election, and that choice does not itself offend the Constitution, the fact that each official does not 'represent' the same number of people does not deny those people equal protection of the laws." *Id*, 397 US 58, citing *Sailors, supra; Wells* v *Edwards*, 409 US 1095 (1973) (election of state supreme court justices from districts without regard to population). And *cf. Avery* v *Midland County*, 390 US 474, 485 (1968).

IV.
APPELLANTS' ARGUMENT CONCERNING THE ALLEGED UNSEVERABILITY OF MICHIGAN CONSTITUTION, 1963, ART IV, §6, HAS BEEN REJECTED IN PREVIOUS CASES.

Appellants' fourth contention, that "Mich. Const. 1963, Art. IV, §6 is void as an integral and inseparable part of a total apportionment mechanism previously declared unconstitutional by the United States Supreme Court," conveniently neglects to mention that subsequent to the remand in *Marshall* v *Hare*, 378 US 561 (1964), the Michigan Supreme Court rejected such contention, this Court dismissed a subsequent appeal from such decision for want of a substantial federal question, and the *Marshall* three-judge court then dismissed that case on account of such "supervening events." The Michigan Court having so ruled, the question of severability was and is foreclosed from federal inquiry, severability being a state not a

federal issue. *Forty-Fourth General Assembly* v *Lucas*, 379 US 693 (1965); *Guinn* v *U.S.*, 238 US 347, 366 (1914).

Thus, immediately after this Court's decision in *Marshall* v *Hare*, 378 US 561 (1964), and before action by the three-judge court on remand, the Michigan Supreme Court acted to enforce the very procedures now challenged. Finding those provisions severable from the invalid substantive provisions for *legislative* apportionment (the so-called "80-20" and ".7" area representation formulae), the Court approved and directed adoption by the legislative apportionment commission of the so-called "Austin-Kleiner" plan. *In Re Apportionment of the State Legislature—1964*, 373 Mich 247 (1964); 373 Mich 250 (1964); 376 Mich 410 (1965); 377 Mich 396 (1966). The Court obviously rejected the solitary views to the contrary of Mr. Justice Souris, 373 Mich 247, 257, as he himself later acknowledged.[9]

The apportionment plan which had been directed for adoption by the Court was then unsuccessfully challenged by private electors in *Re Apportionment of State Legislature-1965-1966, Badgley* v *Secretary of State*, 376 Mich 410 (1965), 377 Mich 396 (1966); and their later appeal to this Court was dismissed for want of a substantial federal question, 385 US 114 (1966), rehearing denied, 385 US 1021 (1967).

Because of the then pending litigation in the Michigan Supreme Court and subsequently in this Court in the *Badgley* appeal, the three-judge panel in *Marshall* v *Hare* had stayed its hand upon remand. (See Appendix hereto.) Finally, after this Court's decision in *Badgley*, the three-

[9] "None of my colleagues agreed. Instead, having concluded, albeit *sub silentio*, that all of section 6 of article 4 survived our declaration of constitutional invalidity of the reapportionment formulate of article 4 * * *." 377 Mich 396, 435.

judge panel in *Marshall* ordered on January 17, 1967, without objection, "that this cause be and the same is hereby dismissed by reason of supervening events subsequent to its remand by the United States Supreme Court. *In the Matter of Apportionment of the Michigan Legislature, Maxwell F. Badgley, et al.*, 377 Mich 396, 377 Mich 474 (April 6, 1966), appeal dismissed for want of a substantial federal question, *Badgley et al.* v *Secretary of State James M. Hare*, No. 505, Oct. Term, 1966, United States Supreme Court,—US—." (Appendix hereto.)

More recently, after the 1970 decennial census, the Michigan Supreme Court again was required to resolve a commission deadlock. *In Re Apportionment of Legislature —1972*, 387 Mich 442 (1972). It did so, again enforcing the very provisions which appellants claim did not survive. See majority opinion of T. M. Kavanagh, C.J., 387 Mich at 450.

All of these decisions of the Michigan Supreme Court, including the decisions affirmed on appeal in *Badgley* by this Court, involved enforcement of the provisions here challenged by appellants and incredibly claimed at this late date—after six intervening elections, in 1964, 1966, 1968, 1970, 1972 and 1974—to have inseparably fallen when the substantive provisions of the state constitution also failed. The decisions and experience attest to exactly the opposite.[10]

[10] Indeed, appellants' attorneys' own efforts in the Michigan Supreme Court to reopen that Court's decision of 1972, following this Court's decision in *Mahan* v *Howell*, 410 US 315 (1973), was premised upon the claim, *inter alia*, that "The decision in *Mahan* indicates that this Court followed erroneous principles of law in adopting the present apportionment plan, *ignored existing and viable provisions of the Michigan Constitution*, and imposed upon the electors of this state, including Petitioners, a scheme that has gerrymandered historical political units into a hodge-podge of electorial districts, all to the harm of Petitioners and other electors." Motion For Relief From Final Judgment, ¶6.

CONCLUSION

Plaintiffs do not, and in the nature of things, cannot point to any discrete interests of theirs, as nominally independent or third-party voters, which either has been impermissibly interdicted or which, under the principles of *Reynolds* v *Sims* (*forbidding* separate "interests" representation) could permissibly be recognized. *Cf. Whitcomb* v *Chavis,* 403 US 124, 153-156 (1971).

This collateral attack must fail and the appeal should be dismissed, or the judgment below should be affirmed.

Respectfully submitted,
THEODORE SACHS
Attorney for Intervening
Defendants-Appellees
1000 Farmer,
Detroit, Michigan 48226
(313) 965-3464

DATED: September 18, 1975

APPENDIX

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UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILLIAM C. MARSHALL, et al, Plaintiffs, vs JAMES M. HARE, Sec'y of State of State of Michigan, Defendant.	Civil No. 24,013 OPINION

This action was commenced in June 1963, following the April 1, 1963, adoption of a new Constitution by the people of the State of Michigan praying for a declaratory judgment, holding certain portions of the said Constitution relating to the apportionment of the State's Legislature void, and for other relief. On March 16, 1964, this Court dismissed the complaint; ROTH, District Judge, dissenting. *Marshall* v. *Hare,* 227 F. Supp. 989.

On June 22, 1964, the United States Supreme Court reversed the judgment below and remanded the case for further proceedings consistent with the views stated in that Court's opinions in *Reynolds vs. Sims* and the other cases relating to state legislative apportionment decided along with *Reynolds. Marshall vs. Hare,* 378 U.S. 561, 12 L. Ed. 2d, 1036. Following the reversal and remand, the intervening defendants moved for summary judgment; and plaintiffs moved for a settlement of judgment in their favor.

Since our decision of March 1964, the Michigan Supreme Court has had several occasions to deal with the matter of the apportionment of the legislature. See *In The Matter of Apportionment of the Michigan Legislature,* 372 Mich. 461 (April 10, 1964); 373 Mich. 243 (June 4, 1964); 373 Mich. 247 (June 17, 1964). And following hard on *Reynolds vs. Sims* (June 15, 1964), the Michigan Supreme Court in 373 Mich. 250 (June 22, 1964) ordered the adoption of a legislative apportionment plan which was followed in the Michigan primary and general elections of 1964.

The Michigan Legislature, elected in accordance with said apportionment plan, is now in session. These supervening events have effected a radical change of circumstances. The posture of this case is not the same as it was in March, 1964.

There is presently pending in the Supreme Court of the State of Michigan an action questioning the current apportionment entitled, "In The Matter of Apportionment of the Michigan Legislature," No. 50999. The amended petition, filed August 1964, asks that Court:

> "in the exercise of its original jurisdiction, to review the apportionment and districting plan (the Plan) with respect to the election of members of the Michigan State Legislature purportedly adopted by the Commission on Legislative Apportionment (the Commission) on June 23, 1964, pursuant to an order of the Supreme Court of Michigan, to remand such Plan to the Commission for further action,"

and for other and further relief.

Among other things, the petition alleges that the Plan failed to provide petitioners and other citizens of the

State fair and effective representation; that it deprives them of the equal protection of the laws; that it denies them rights without due process of law; that it violates the Constitution of the United States, the Michigan Constitution of 1963, the statutes of the State of Michigan, the Civil Rights Act, 42 U.S.C. Sections 1983, 1988, and the decisions of the Supreme Court of the United States; and that its apportionment of districts constitutes gerrymandering. An answer to the amended petition has been filed by the Attorney General of the State, on behalf of James M. Hare, Secretary of State, denying the material allegations and alleging that the Plan now in effect meets all legal requirements.

We take judical notice of the actions of the Supreme Court of the State of Michigan, of the election of state representatives and senators at the Michigan general election in November 1964, and of the pleadings in the state case (since they are public documents). See *Zahn vs. Transamerica Corp.,* 162 F. 2d 36, 48; *Hipp vs. Hipp,* 191 F. Supp. 299; *Wagner vs. Fawcett Publications,* 307 F. 2d 409, 411; *Smith vs. Settle,* 212 F. Supp. 622; and *T.V.T. Corp. vs. Basiliko,* 257 F. 2d 185. See also McCormick on Evidence, Sect. 327; Wigmore, 3rd Ed., Sec. 2579; ALI Model Code of Evidence, Rule 801.

At this time, the Michigan Supreme Court is the most appropriate forum to determine the issues presented by the pending challenges (or others) respecting the Michigan legislative apportionment plan. We agree with the Pennsylvania Supreme Court when it said:

> "Historically and logically, this Court is the most appropriate forum to determine the issues presented and to fashion suitable remedies. Proper and con-

tinuing respect for federal-state judicial relationships necessitates consideration by the Supreme Court of Pennsylvania of the relevant state statutes and state constitutional provisions, subject, of course, to review by the Supreme Court of the United States." *Blutcher vs. Bloom,* 203 A. 2d 556, 559.

We consider the mandate of the Supreme Court to require us to proceed in accordance with not only the letter, but also the spirit of its rulings in the apportionment cases of 1964 *(Reynolds vs. Sims, et al);* and to take cognizance of the change of circumstance. We feel it appropriate to give due respect to the jurisdiction of the Supreme Court of the State of Michigan to deal with Michigan's Constitution. Since it appears that the issues awaiting resolution in the case at bar are before the Supreme Court of Michigan, we consider it proper at this time to abstain from further consideration of this case pending the progress of the said litigation in the Supreme Court of Michigan, or until further order of this Court.

It is so ordered.

Dated: May 11, 1965

CLIFFORD O'SULLIVAN
United States District Judge

FRED W. KAESS
United States Circuit Judge

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILLIAM C. MARSHALL, et al, Plaintiffs, vs. JAMES M. HARE, Secretary of State of Michigan, Defendant.	Civil Action No. 24013 OPINION

I find myself in agreement generally with the views of my colleagues; but, with all due respect, I am unable to agree with their conclusion to retain jurisdiction. I would dismiss the case and be done with it and go on to other work. This Court, like the United States Supreme Court, does not sit to decide arguments after events have put them to rest. *Doremus vs. Board of Education of Hawthorne,* 342 U.S. 429, 72 S. Ct. 394, 96 L. Ed. 475, 479; *United States vs. Alaska S.S. Co.,* 253 U.S. 113, 40 S. Ct. 448, 64 L. Ed. 808; *Mills vs. Green,* 159 U.S. 651, 40 L. Ed. 293; *Berry vs. Davis,* 242 U.S. 468, 61 L. Ed. 441. And no court but the United States Supreme Court can entertain a proceeding to reverse or modify the judgment of the Michigan Supreme Court in *In Re Apportionment of Legislature,* 373 Mich. 250. *Rooker vs. Fidelity Trust Co.,* 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362. As pointed out by J. Skelly Wright, District Judge, in *Manufacturers Record vs. Lauer,* 169 F. Supp. 234, 237, there is no justification for the courts of the federal system to nullify the judgments obtained in the courts of another. This principle of comity has been recognized by both Congress and the federal courts.

This Court has only original jurisdiction and to do what the parties here ask would be, in effect, an exercise of appellate jurisdiction. We have no jurisdiction to reverse or modify the judgment of a state court. *Williams vs. Tooke,* 108 F. 2d 758. And we should do no less than the United States Supreme Court did in *Maryland Committee vs. Tawes,* 377 U.S. 656, 675, 12 L. Ed. 595:

> "We applaud the willingness of state courts to assume jurisdiction and render decision in cases involving challenges to state legislative apportionment schemes."

It appears to me appropriate to follow Justice Holmes' suggestion that "We should lean toward an agreement with the state courts, especially in a matter like this." *Messinger vs. Anderson,* 225 U.S. 436, 56 L. Ed. 1152, 1156, reversing 171 F. 785 (CCA 6).

To paraphrase my colleague District Judge Kaess' observation in this case (227 F. Supp. 989, 990), the responsibility of determining whether the apportionment plan now in effect complies with the constitutional requirements, both state and federal, rests with the Supreme Court of the State of Michigan. We would do well to avoid the unjust and unnatural consequence of having two measures of administering justice in the same state.

For the reasons stated, and, in light of events supervening since entry of the order of reversal and remand by the United States Supreme Court, I would dismiss this action.

STEPHEN J. ROTH
United States District Judge

DATED: May 11th 1965

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILLIAM C. MARSHALL, BARNEY HOPKINS, AUGUST SCHOLLE, ALEXANDER D. FULLER, and CHARLES A. ROGERS,

Plaintiffs,

vs.

JAMES M. HARE, Secretary of State,

Defendant,

STANTON S. FAVILLE, Chief Assistant Attorney General of the State of Michigan,
FRANK D. BEADLE and PAUL C. YOUNGER, Senators of the State of Michigan,

Intervening Defendants

Civil #24013

ORDER DENYING MOTION TO DISMISS

This cause is now before the Court upon motion of plaintiffs to dismiss, made upon the ground that the decision of the Michigan Supreme Court *In the Matter of Apportionment of the Michigan Legislature, Maxwell F. Badgley, et al, plaintiffs,* 377 Mich. 474, 377 Mich. 388, (April 6, 1966), has disposed of the issues in this cause.

By order entered on May 11, 1965, this Court abstained from proceeding with the then pending plaintiffs' motion for settlement of judgment in their favor, and the intervening defendants' motion for summary judgment. Such order was entered upon the view of a majority of the panel hearing this cause that they considered it "proper at this time to abstain from further consideration of this case pending the progress of the said litigation [*In the Matter of the Apportionment of the Michigan Legislature, Maxwell F. Badgley, et al, supra*] in the Supreme Court of Michigan, or until the further order of this Court." The Court is now advised that plaintiffs Badgley, et al, have filed notice of appeal to the Supreme Court of the United States from the aforesaid decision of the Supreme Court of Michigan and said appeal is now pending therein. Upon consideration of the present motion, and there being no showing of prejudice to plaintiffs from continued abstention by this Court, a majority of the panel convened to hear this cause considers it proper to further abstain from ruling upon any motions now pending before this Court in this cause, and

NOW THEREFORE, IT IS ORDERED that plaintiffs' pending motion to dismiss, argued before this Court on August 22, 1966, be, and the same is, hereby denied without prejudice to its renewal upon disposition by the United States Supreme Court of the appeal made to it from the aforementioned decision of the Michigan Supreme Court.

Clifford O'Sullivan
U. S. Circuit Judge

Fred W. Kaess
U. S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILLIAM C. MARSHALL, BARNEY HOPKINS, AUGUST SCHOLLE, ALEXANDER D. FULLER, and CHARLES A. ROGERS,

Plaintiffs,

vs.

JAMES M. HARE, Secretary of State,

Defendant,

STANTON S. FAVILLE, Chief Assitant Attorney General of the State of Michigan,
FRANK D. BEADLE and PAUL C. YOUNGER, Senators of the State of Michigan,

Intervening Defendants

Civil #24013

RULING ON MOTION TO DISMISS

ROTH, District Judge, dissenting.

This action was instituted in June 1963, in an effort to prevent the implementation of the newly adopted Michigan Constitution's provisions for apportionment of the two Houses of the State's Legislature. In March 1964, this Court, myself dissenting, dismissed the complaint.

On June 22, 1964, the United States Supreme Court handed down its series of apportionment decisions and reversed and remanded this cause. On the same day, the Michigan Supreme Court ordered the adoption of an apportionment plan which was implemented by primary and general elections and the installation of a Legislature which has been and is now serving. In August, 1964, a suit was filed to test the constitutionality of the 1964 apportionment in the Michigan Supreme Court, whose action in dismissing the complaint is now on appeal to the United States Supreme Court. I gave what I considered to be valid reasons for dismissing this action on May 11, 1965; those reasons are now reinforced by events subsequent.

This cause of action is and has been dead for some time; and common decency, I believe, requires its belated burial. I would dismiss the action.

STEPHEN J. ROTH
UNITED STATES DISTRICT
JUDGE

Dated: September 16, 1966

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILLIAM C. MARSHALL, BARNEY HOPKINS, AUGUST SCHOLLE, ALEXANDER D. FULLER and CHARLES A. ROGERS,

Plaintiffs,

-vs-

JAMES M. HARE, Secretary of State of the State of Michigan,

Defendant,

and

STANTON S. FAVILLE, Chief Assistant Attorney General of the State of Michigan,

and

FRANK D. BEADLE, JOHN W. FITZGERALD and PAUL C. YOUNGER, Senators of the State of Michigan,

Intervening Defendants.

No. 24013

ORDER DISMISSING CAUSE

At a session of said Court held in the Federal Building in the City of Detroit, Michigan, on January 17, 1967. PRESENT: HONORABLE CLIFFORD O'SULLIVAN, U. S. Circuit Judge; HONORABLE FRED W. KAESS,

U.S. District Judge; HONORABLE STEPHEN J. ROTH, U. S. District Judge.

This matter having come on to be heard upon plaintiffs' motion to dismiss for reason of supervening events, and defendant and intervening defendants having advised the Court that they have no objections to said dismissal as prayed, and the Court being fully advised in the premises, now, therefore,

IT IS ORDERED that this cause be and the same is hereby dismissed by reason of supervening events subsequent to its remand by the United States Supreme Court. *In the Matter of Apportionment of the Michigan Legislature, Maxwell F. Badgley, et al.,* 377 Mich. 396, 377 Mich. 474 (April 6, 1966), appeal dismissed for want of a substantial federal question. *Badgley et al. v. Secretary of State James M. Hare,* No. 505, Oct. Term, 1966, United States Supreme Court, ——U.S.——. No costs, a public question being involved.

CLIFFORD O'SULLIVAN
U. S. CIRCUIT JUDGE

THOMAS P. THORNTON
U. S. DISTRICT JUDGE
In place and stead of Judge
Fred W. Kaess

STEPHEN J. ROTH
U. S. DISTRICT JUDGE